No. 10504

IN THE
UNITED STATES
CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT

RIDDER BROTHERS, Incorporated, a corporation,
Appellant.

vs.

RAE KINGSLEY BLETHEN, F. D. HAMMONS and WILLIAM K. BLETHEN, as Executors of the Estate of Clarance B. Blethen, Deceased; RAE KINGSLEY BLETHEN, FRANCIS A. BLETHEN; WILLIAM K. BLETHEN; JOHN ALDEN BLETHEN; CLARANCE B. BLETHEN; THE BLETHEN CORPORATION, a Corporation; and SEATTLE TIMES COMPANY, a Corporation,
Appellees.

UPON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION
HONORABLE JOHN C. BOWEN, *Judge*

BRIEF OF APPELLEE

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BRIEF OF APPELLEE

STATEMENT OF THE CASE

The appellant in its brief has set forth an accurate statement of the case. Normally under the rules of this Court we would not attempt to duplicate that statement here. We do so in this instance for two reasons only. In the first place the facts are somewhat complex, and it occurs to us that it may be of service to the members of this Court who read this

brief to have before them an account of the facts in the same volume as that which contains appellees' argument, so as to avoid any necessity of having to refer to the appellant's brief for that purpose.

In the second place, while the parties are on common ground as to the facts, the manner in which the same are presented and emphasized necessarily differs to some extent, and we feel that the Court might have a clearer understanding of the appellees' position if the facts were made available to the Court in the appellees' language.

This is an action for specific performance of a written contract. The contract in question was one made on December 30, 1929, between Clarance B. Blethen, now deceased, who will hereinafter be referred to, for purposes of brevity, as Blethen, Sr., and Bernard H. Ridder, Joseph E. Ridder and Victor Ridder, as co-partners. This contract was amended subsequently, and all reference hereinafter made to it deal with the contract in its amended form.

The suit is brought by a corporation, Ridder Brothers, Incorporated, which is the successor in interest to the Ridder copartnership. The defendants in this suit are the three executors of the estate of Blethen, Sr., one of whom is the widow of Blethen, Sr., the four sons of Blethen, Sr., the surviving widow in her individual capacity, and two corporations, The Blethen Corporation, and the Seattle Times Company.

The contract of December 30, 1929, which forms the basis of this suit, was one of several documents executed in connection with a rather elaborate plan

under which the ownership of the newspaper known as the Seattle Times was substantially changed in the latter part of 1929 and the early part of 1930. These contracts are set forth as Exhibits A to G to plaintiff's complaint and appear in the Transcript, pages 31 to 79. The contract of December 30, 1929, is Exhibit D, commencing on page 56 of the Transcript. Exhibits E, F and G are the amendments to Exhibit D.

The nature of the reorganization which took place in the ownership of the newspaper at that time need, for the purpose of this litigation, be described only in a general way. Prior to this reorganization the newspaper had been owned by a Nevada corporation called Seattle Times, Incorporated. The stock of this corporation was owned by Blethen, Sr. and other members of his family. As a result of the reorganization a new corporation, known as Seattle Times Company, was organized under the laws of Delaware, and the stock of this corporation, controlling the newspaper and its operations, was acquired by Blethen, Sr. and the copartnership of the Ridder Brothers. In other words, the members of the Blethen family, other than Blethen, Sr., sold all of their interest in the newspaper and the Ridder Brothers came in as part owners of the enterprise along with Blethen, Sr.

The new corporation, Seattle Times Company, issued preferred stock and two classes of common stock designated as Class A and Class B common respectively. It is the appellees' position that we are interested in this case solely in the Class B common stock. That stock possesses the sole voting power in the corporation unless dividends on the preferred stock are

in arrears, a condition which does not now exist, and is of no importance upon this appeal.

The total number of shares of the Class B common stock of Seattle Times Company is 1,000. As a part of the plan for reorganization it was agreed between Blethen, Sr. and the Ridder Brothers that Blethen should acquire 560 shares of the Class B stock (Tr. 35) and the Ridder Brothers should acquire the remaining 440 shares (Tr. 36). Obviously this contemplated the practical result that Blethen, Sr. should control a majority of the stock possessing the voting power of the corporation. This agreement was carried out and the Ridder Brothers did receive their 440 shares of Class B stock. Blethen, Sr. actually took 550 shares and Elmer E. Todd received the remaining 10 shares to which Blethen was entitled (Tr. 10). Subsequently Ridder Brothers, the copartnership, formed a corporation which took over all of the 440 shares of the partnership (Tr. 10, 11). This corporation, as the present owner of these shares, is the appellant here and plaintiff in the court below. Blethen, Sr. likewise formed a corporation, to which he transferred 455 shares of the Class B stock out of his block of 550 shares (Tr. 11). The formation of both these corporations and the transfer of these amounts of stock to them was agreed to by both the Ridders and Blethen (Tr. 59, 77). In the case of Blethen's corporation it was required that he personally retain ownership of 60% of the stock of his corporation, the name of which is The Blethen Corporation (Tr. 77). Blethen, Sr. at all times did hold this percentage of

the stock and the necessary amount is still held by his executors (Tr. 17).

By further agreement between Blethen, Sr. and the Ridders, Blethen transferred to Ridder Brothers, Incorporated, the appellant here, 40 of the shares of the Class B stock originally acquired by him (Tr. 11). Blethen also transferred 1 of the shares of this stock to his wife, Rae Kingsley Blethen, who is one of the appellees here both as executrix and in her individual capacity (Tr. 11). Blethen, Sr. personally retained 39 of the shares of the Class B stock (Tr. 11). Thus, as matters stood at the time of the death of Blethen, Sr. in the autumn of 1941, the 1,000 shares of Class B common stock were held as follows:

Ridder Brothers, Incorporated ..... 495 shares;
The Blethen Corporation ..... 455 shares;
Blethen, Sr. ..... 39 shares;
Rae Kingsley Blethen, the wife of Blethen, Sr..1 share;
Elmer E. Todd ..... 10 shares.

To state the nature of this ownership in somewhat different form, the appellant owned 495 shares, the Blethen interests in the aggregate a like 495 shares, and the remaining 10 shares were held by Elmer E. Todd, in what might be called the balance of power.

Blethen, Sr. died on October 30, 1941, and thereafter his will, executed on December 4, 1940, was admitted to probate in King County, Washington (Tr. 16, 17). This litigation is entirely concerned with appellant's contention that this will violates the provisions of the eighth paragraph of the contract of December 30, 1929, as amended by further agreement dated June 30, 1930 (Tr. 76, 77). It is neces-

sary, therefore, to consider the terms of this paragraph of the contract, and the provisions of the will which was admitted to probate.

Paragraph 8 of the contract as amended reads as follows:

> "Eighth: Blethen agrees, immediately after the issuance of Class B common stock to him, to make a last Will and Testament, or some other instrument in writing, which will provide in effect that his Class B common stock be held in trust by his trustees after his death for a period of twenty-one (21) years from December 30, 1929. Such last Will and Testament or other trust instrument shall also provide that Blethen's Class B common stock shall not be sold by his trustees until the termination of such trust. Such last Will and Testament or other trust instrument shall constitute, nominate and appoint the widow of said Blethen as one of the trustees, Bernard H. Ridder, another of such trustees, and Elmer E. Todd, the third of such trustees. It shall further provide that, in the event of the death, resignation or disability of his widow at any time, the vacancy caused thereby shall not be filled but the surviving trustees shall act. In the event of the death, resignation or disability of Bernard H. Ridder at any time, one of his brothers shall act as trustee in his place and stead, and in the event of the death, resignation or disability of Elmer E. Todd at any time, one of the partners of the law firm now representing Blethen shall act as trustee in his place and stead. Such last Will and Testament or other trust instrument shall also provide that upon the termination of the trust, Blethen's Class B common stock shall

be distributed by the trustees among the surviving sons of said Blethen and the issue of such of them as may be deceased, in equal shares, per stirpes. Such last Will and Testament, or other trust instrument, shall further provide that, in case of any difference or differences of opinion between the said trustees as to any question connected with the management of the corporation, the Class B common stock of which is to constitute the corpus of the trust, any trustee may submit such a question for arbitration, upon notice to the other trustees, to the then general manager of The Associated Press, and in any such case the decision of the said then general manager of The Associated Press shall be final and conclusive and be binding upon all of said trustees. Provided, however, that if said Blethen transfers, to a holding corporation to be formed by him, any of his Class B common stock in Seattle Times Company, a Delaware corporation (not less, in any event, than fifty-one (51) per cent of such stock at any time issued and outstanding), as permitted by the Fifth paragraph of the agreement of December 30, 1929, as herein modified, his last Will and Testament shall contain suitable provisions that not less than sixty (60) per cent of the voting stock of such holding corporation shall pass to the trustees above named, to be held in trust for the same period and under the same terms and conditions hereinabove provided."

There are just four points in this paragraph 8 which are of any importance on this appeal.

First, Blethen, Sr.'s agreement to make a last will and testament, or some other instrument in writing,

providing that his Class B common stock be held in trust by his trustees after his death for a period of 21 years from December 30, 1929, that is, until December 30, 1950.

Second. That the original trustees should be the widow of said Blethen, Sr., Bernard H. Ridder or one of his brothers as his successor, and Elmer E. Todd or one of the members of the law firm representing Blethen, Sr. as his successor.

Third. That the will, or other trust instrument, should provide that upon termination of the trust the Class B stock should be distributed by the trustees among Blethen's surviving sons, and the issue of such of them as may be deceased, in equal shares per stirpes.

Fourth. That in the event of any difference of opinion between the trustees as to the management of the Seattle Times Company, any trustee might submit such question to the then general manager of the Associated Press for arbitration, and the decision of the latter would be binding.

The appellant asserts that the will of Blethen, Sr. breached the terms of this portion of the contract of December 30, 1929, in two particulars. In the first place this will designated the three executors, defendants in the court below and appellees here, as the persons who should vote the stock of The Blethen Corporation, which in turn controlled the greater portion of Blethen's Class B common stock, and also should vote the Class B common stock owned outright by Blethen, during the period while Blethen,

Sr.'s estate was in the course of administration. The three executors are different persons from the three trustees designated in paragraph 8 of the agreement of December 30, 1929, as amended (Tr. 76, 77), except for the fact that the surviving widow is named both as executrix and trustee. It is the contention of the appellant that the three trustees named in the agreement of December 30, 1929, should have the right to vote the stock during the period of probate, and that Blethen broke his contract by vesting that power in the executors. It must be kept in mind that Blethen, Sr. did set up a trust in his will under which the three trustees named in the contract of December 30, 1929, will become entitled to hold and vote the stock after probate of the estate is completed. The first breach claimed is therefore confined to the period of probate of Blethen, Sr.'s estate.

The second breach claimed by appellant rests in the fact that Blethen, Sr. in his will disinherited one of his sons, whose name is Clarance B. Blethen II. This was done simply by a provision in the will under which, at the expiration of the trust, the stock held by the trustees is to be distributed to three named sons of Blethen, Sr., other than Clarance B. Blethen II.

We have, then, arising out of the complex maze of documents, two separate and distinct matters in controversy. The first is, did Blethen, Sr. breach his contract by vesting voting power in his executors rather than his trustees *during the period of probate of his estate?*

The second is, did Blethen, Sr. breach his contract by disinheriting one of his sons?

The appellant, asserting that both such breaches exist, seeks a decree under which the trustees would be given the voting power during probate, and the trust would be reformed so as to permit Clarance B. Blethen II to share equally with his brothers in the trust assets upon the termination of the trust.

The appellees moved to dismiss the action in the District Court upon the ground that the necessary jurisdictional amount of Three Thousand Dollars was not involved (Tr. 80, 81). This motion was sustained by the District Court and judgment of dismissal entered thereon (Tr. 84, 85). In support of their motion the appellees maintained the following propositions in the District Court, which are precisely the same as those maintained on this appeal:

1. That as to the first matter in controversy the complaint did not state a cause of action, and therefore could not possibly involve the jurisdictional amount. The ground for this contention was that under the laws of the State of Washington, the right to vote the stock of a decedent dying testate passes to his executors as a matter of law, and consequently that no provision in a will or elsewhere, which would vest in trustees the power to vote corporate stock of the decedent during probate, would be valid.

2. That even if it might be assumed, for the sake of argument, that Blethen, Sr. legally could have placed the voting power in the hands of the trustees during probate, nevertheless any right of the plaintiff to have the stock voted by the trustees is not susceptible of valuation in terms of money, and consequent-

ly no controversy is thereby presented which involves the jurisdictional amount.

3. That as to the second matter in controversy no cause of action is stated, and consequently no amount whatsoever is involved, because the right to maintain a suit to establish a trust in favor of Clarance B. Blethen II, is vested solely in Clarance B. Blethen II, and not in the plaintiff.

4. That even if the plaintiff possessed some technical right to maintain a suit on the second matter in controversy, the value of that right to the plaintiff would be nominal only, that the jurisdictional amount is to be tested by the value *to the plaintiff* of the right asserted, and that such value in this instance could not possibly reach the jurisdictional amount.

In the District Court the question of whether the trustees or the executors should have the voting power was identified as the first matter in controversy, and the question of the rights of Clarance B. Blethen II to share in his father's estate was identified as the second matter in controversy. These questions have been likewise so identified in the appellant's brief in this Court, and to avoid confusion we will employ the same identification here. The appellant has, however, in its brief relied upon the second matter in controversy as its major point to uphold jurisdiction, and has discussed that matter as its first point in its brief. Again we shall follow the appellant's lead and treat the second matter in controversy first.

ARGUMENT

THE COMPLAINT STATES NO CAUSE OF ACTION WITH RESPECT TO THE SECOND MATTER IN CONTROVERSY, AND CONSEQUENTLY THE JURISDICTIONAL AMOUNT DOES NOT EXIST WITH RESPECT TO THAT MATTER.

It is obvious that if no cause of action is stated with respect to a particular matter in controversy, such matter cannot possibly involve the jurisdictional amount. The value of such a matter in controversy is clearly zero, and not the necessary jurisdictional amount of $3,000.00, or any part thereof.

The appellees maintain that the appellant's complaint states no cause of action upon the second matter in controversy, that is, the alleged right of Clarance B. Blethen II to share with his brothers in the ownership of the corporate stock upon the termination of the trust, because if such a right does exist, it can be enforced only in a suit brought by Clarance B. Blethen II himself, and not in a suit brought by the appellant corporation.

Clearly the provision in the contract relative to the ultimate distribution of the stock upon termination of the trust can be of real interest only to the Blethen family, and particularly to Clarance B. Blethen II, who, under the will, was eliminated from participation in the trust assets. The appellant, Ridder Brothers, Incorporated, will not be one cent better or worse off whether Clarance B. Blethen II should ultimately share in the trust assets or not.

Upon the distribution of the trust assets, whether such distribution be made to three of the four sons of Blethen, Sr., or to all of them, the distributees will be free to do with the stock exactly as each of them sees fit. The only connection that the appellant corporation has with this particular provision is that its predecessor, the Ridder Brothers copartnership, happened to be a party to the contract in which the provision was set forth.

The contract, insofar as this matter in controversy is concerned, was, then, viewed from an angle most favorable to the appellant, one made between the Ridder Brothers copartnership and Blethen, Sr. for the benefit of third party beneficiaries, namely, Blethen's sons, including Clarance Blethen II.

It is now familiar law that there are three kinds of beneficiary contracts, (1) creditor beneficiary, (2) incidental beneficiary, and (3) donee beneficiary.

The complaint is barren of any allegation that there is now, or ever was, any creditor-debtor relationship between the Ridder Brothers copartnership and Clarance Blethen II. Hence Clarance Blethen II is not a creditor beneficiary and appellant does not claim that he is. If he is not a creditor beneficiary he must be either an incidental beneficiary or donee beneficiary. It is the firm view of appellees that the sons of Blethen, Sr., including Clarance Blethen II, were only incidental beneficiaries under the contract, because it was not the purpose of the two contracting parties in making their agreement with respect to

the stock to make financial provision for the sons at the termination of the trust period.

We make no issue before this Court, however, as to whether or not Blethen's sons were incidental beneficiaries. Suffice it to say, for the sake of this argument, that appellant *does not* and *would not* claim that Clarance Blethen II was an incidental beneficiary. He must then, according to appellant's view, be a donee beneficiary. From what has just been said, it is apparent that appellees emphatically deny that such is the fact.

Again that issue, however, need not be determined by this Court because, assuming for the sake of argument, and for the sake of argument only, that Clarance Blethen II is a donee beneficiary, nevertheless, under the law of the State of Washington the promisee in a contract has no right of action to enforce the provision of the contract which benefits the donee beneficiary.

It is true that the holdings of the American courts as to the right of a promisee to sue to establish the right or rights of a donee beneficiary are conflicting. Parenthetically, it may be said that even in those jurisdictions where the promisee is permitted to sue, the courts of those jurisdictions declare with one voice that the promisee's right to sue is "purely technical because breach of the promise causes him (the promisee) *no pecuniary damage.*" Williston on Contracts, Vol. 2, Revised Ed., Sec. 390.

When, however, we endeavor to determine whether the promisee can maintain a suit at all, the courts

speak with a voice diverse. In Volume 17 C.J.S., page 1140, it is said:

> "It has been held generally that one in whose name a contract is made for the benefit of another may sue on it in his own name, even when an action might be maintained by the other, the code provisions in some of the states expressly permitting the promisee to sue in his own name without joining the beneficiary. However, in a jurisdiction where the real party in interest is required to sue, it has been held that the action *must be brought* by the *beneficiary* and *not* by the party *in whose name the contract was made.*"

A more complete statement of this divergence of opinion can be found in Williston on Contracts, Vol. 2, Revised Ed., Section 390.

But it is not at all material here to determine which of these divergent views are correct, for, as the encyclopedia writer just quoted says, there are jurisdictions where "the action *must be brought* by the *beneficiary* and *not* by the party in whose name the contract was made." And the writer cites in support of the foregoing statement the case of *MacGerry v. Rodgers*, 144 Wash. 375, 258 Pac. 314. In that action a woman sued upon a contract, alleging that the defendants agreed, for a valid consideration, to support her and her child for the remainder of defendants' lives. Clearly, after the child reached the age of majority, such a contract would be solely for the benefit of the child as donee beneficiary. Under these circumstances the court held that the plaintiff mother, as promisee, could not in her action recover on the contract insofar as it affected the rights of the child after attaining the

age of majority, saying that it should be left to "the child to recover, if it might, for the loss of the benefits, if any, which might be expected to accrue to it under the alleged contract after the age of dependency had passed."

Now, making the assumption that Clarance Blethen II is a donee beneficiary, the *MacGerry* case and this case are absolutely indistinguishable. The contract in the *MacGerry* case was made between the defendants and the mother, the child not being a party. The contract here was made between Clarance Blethen, Sr. and the predecessors of appellant, no one of the sons of Blethen, Sr. being a party. In the *MacGerry* case, so far as benefits to accrue to the child after majority were concerned, the contract was made entirely for the benefit of the child, who was not a party to the contract itself. In this case the contract, so far as Clarance Blethen II was concerned, was made entirely for his benefit and he was not a party to the actual contract itself. In each case the contract is not of any benefit to the promisee, who was a party to the contract.

The decision in the *MacGerry* case has the support of common sense. The only real party in interest in the donee beneficiary contract is the donee beneficiary. If the real party in interest can sue, why should the promisee, who has no real interest and whose recovery, even in those jurisdictions which permit the promisee to sue, would be only nominal damages, be allowed to sue? If a promisee is allowed to sue, we not only have the promisor exposed unnecessarily to two suits based on the same subject matter but maintained by different parties, but also we have the distinct possibility

that the promisee may maintain the action in a manner utterly contrary to the wishes of the beneficiary, who alone is vitally interested in the suit. Be that as it may, the principle announced in the *MacGerry* case settles the question in the State of Washington and announces a ruling binding upon the Federal Courts.

THE JURISDICTIONAL AMOUNT IS TO BE TESTED BY THE VALUE OF THE RIGHT TO THE PLAINTIFF. ANY RIGHT WHICH PLAINTIFF MAY HAVE ON THE SECOND MATTER IN CONTROVERSY IS OF NOMINAL VALUE ONLY AND FAR LESS THAN THE JURISDICTIONAL AMOUNT.

In seeking to support the jurisdiction of the District Court, appellant devotes its major and primary argument to the proposition that jurisdiction exists because, if appellant should prevail on the second matter in controversy, certain of the defendants would lose more than $3,000. This argument necessarily assumes first, that a cause of action is stated with respect to the second matter in controversy, and second, that jurisdictional amount can properly be tested by viewing the controversy from the standpoint of the defendant.

The appellees have already in this brief demonstrated that the first of these assumptions is erroneous and that jurisdiction does not exist on the second matter in controversy because no cause of action exists in plaintiff's favor thereon. Notwithstanding that and assuming, however, only for the purpose of meeting appellant's argument, that a cause of action is stated on the second matter in controversy, appel-

lees assert that jurisdiction cannot be tested by what appellees or any of them stand to lose, *but only by the value of the right to the plaintiff.*

The parties are in complete agreement upon the factual proposition that the plaintiff corporation does not stand to gain anything under the second matter in controversy, but that three of the defendants, Francis A. Blethen, William K. Blethen and John Alden Blethen would lose more than $3,000 if their brother, Clarance B. Blethen II, should take a one-quarter interest in the trust property. The point now under discussion, therefore, squarely raises the question of whether jurisdiction is to be tested by the value of the right to the plaintiff or whether it may, in the alternative, be based upon loss to the defendants in excess of the jurisdictional amount. These alternative tests have been referred to by the commentators as the plaintiff viewpoint and defendant viewpoint rules and will hereafter be so described in this brief.

The appellees concede that many statements can be found in the decisions of the District Courts and the Circuit Courts of Appeals which would appear to support the defendant viewpoint rule as an alternative test of jurisdiction. Appellees, however, maintain that the Supreme Court of the United States is now firmly committed to the plaintiff viewpoint rule as the sole test for determining the existence of the jurisdictional amount, and that the statements contained in the decisions of the lower federal courts originate in dictum and do not announce the true rule.

It is readily apparent that in the overwhelming majority of cases, the problem is purely academic. Ordinarily the possible gain to the plaintiff and the possible loss to the defendant are identical amounts. Thus the application of either the plaintiff viewpoint or defendant viewpoint rule will in such cases lead to the same result. Consequently, the lower federal courts in expressing the formula for determining jurisdiction have stated that the test may be made alternately from the viewpoint of plaintiff or defendant, when in fact no occasion existed to consider the matter from any alternate standpoint. However, it must be kept in mind that under such circumstances neither counsel nor the court had their attention directed to the somewhat unique situations, like that in the case at bar, when the values as tested from opposite viewpoints would radically differ. Any statement contained in a decision which was unnecessary to the ultimate ruling made, is, of course, not binding as a precedent, but often is unhappily taken as a reasoned proposition in subsequent litigation when the point is vital. The appellees maintain that this is precisely what has occurred to some extent in the lower federal courts on the point here under discussion, and oppose the perpetuation of the erroneous defendant viewpoint rule here.

The leading case thought to support the defendant viewpoint rule is *Cowell v. City Water Supply Company*, 121 Fed. 53, a decision of the Circuit Court of Appeals for the Eighth Circuit rendered in 1903. In that case the plaintiff had been the owner of a $1,000 bond issued by the Iowa Water Company.

The bond issue being in default, a bondholders' committee was formed to which plaintiff and the other bondholders surrendered their bonds. The committee foreclosed the underlying mortgage and acquired the property. Then the committee formed a new corporation to which this property was transferred and the new corporation placed new mortgages on the property in the aggregate principal amount of $475,000. The plaintiff alleged that these proceedings by the bondholders' committee and the new corporation subsequent to foreclosure of the mortgage securing the bonds were unlawful and in violation of his rights. He further alleged that the value of the property was $525,000 and he sought to have the mortgage canceled upon behalf of himself and all others similarly situated. Plaintiff himself claimed only a 1/325th interest in the property. Applying this fraction to the whole value of the property resulted in a sum less than the jurisdictional amount. The court held that, if plaintiff should prevail, only his interest would be involved and that the only decree that could be entered was one affecting plaintiff's 1/325th interest in the property. Consequently jurisdiction was denied because this interest did not have a value in excess of the jurisdictional amount. In the view adopted by the court the value to the plaintiff and the loss to the defendant would be one and the same. In arriving at its decision the court reviewed a number of authorities and concluded with the statement:

> "Perhaps these cases sufficiently illustrate and establish the rule that it is the amount or

value of that which the complainant claims to recover, or the sum or value of that which the defendant will lose if the complainant succeeds in his suit, that constitutes the jurisdictional sum or value of the matter in dispute, which tests the jurisdiction of the Circuit Courts of the United States."

A critical analysis of this statement, which is the major source relied on for the defendant viewpoint rule, develops several points. Of these appellees make the following:

1. As already noted, the value to the plaintiff and the loss to the defendant in the *Cowell* case were one and the same. The alternative plaintiff or defendant viewpoint test was therefore of no moment in arriving at the decision.
2. The court states that "perhaps" the authorities, which it reviews, establish the rule announced. We categorically assert that there is not a single decision cited in the *Cowell* case, which contains any language which is comparable to that above quoted from the *Cowell* case or contains anything from which the defendant viewpoint rule can be deduced, except the case of *Smith v. Adams*, 130 U. S. 167, 9 Sup. Ct. 566, 32 L. ed. 895, which we shall shortly discuss.

Space does not permit nor does necessity require an analysis of all of the decisions cited in the *Cowell* case. In addition to pointing out generally that none of those cases, with the possible exception of *Smith v. Adams*, affords any foundation for language indicating approval of the defendant viewpoint rule, we assert that the substance of some of the decisions cited in the *Cowell* case supports the plaintiff viewpoint rule exclusively.

Thus in *Miller v. Clark*, 138 U. S. 223, 11 Sup. Ct. 300, 34 L. ed. 966, plaintiff claimed a 1/6th interest in an estate and sued to prevent the executor from delivering three bank deposit books evidencing total deposits of over $5,000 to three persons in whose names they stood. These three persons were also named as defendants. Obviously they stood to lose more than the jurisdictional amount of $5,000 which then measured the jurisdiction of the Supreme Court of the United States under a statute virtually identical with the present jurisdictional statute for the District Courts. Jurisdiction of the Supreme Court was challenged by the defendants on the ground that none of the passbooks claimed by each of the three defendants had a value of $5,000. This challenge clearly approached the problem from the viewpoint of the defendants. The court, however, in denying jurisdiction did so solely because jurisdiction did not exist from plaintiff's viewpoint. In so doing the court said:

> "We are of the opinion that the appeal must be dismissed, *on the ground that the interest of the plaintiff* does not exceed $5,000. As the total amount involved is only $5377.83, and the interest of the plaintiff in that sum is, under the will, only one-sixth thereof, or $896.30½, this court has no jurisdiction of her appeal."

Under appellant's theory, the Supreme Court could not have disposed of the case simply by this comment on the value of the plaintiff's interest. It would of necessity have been compelled to then view the matter from the standpoint of defendants and decide whether jurisdiction could rest on their possible loss.

That it did not do so is the clearest indication that the Supreme Court regarded the plaintiff viewpoint rule as the sole test.

Bruce v. Manchester & Keene Railroad, 117 U. S. 514, 6 Sup. Ct. 849, 29 L. ed. 990, is of like import. There two bondholders brought an action to foreclose a $500,000 mortgage securing a bond issue. The aggregate claims of the two bondholders was $3400. The court held that the latter figure was the sole test of its jurisdiction and being less than $5,000 could not support jurisdiction. The court pointed out that the litigation could be concluded at any time by payment to plaintiffs of the amount of their claims. It recognized that if such payment were not made, the result might be foreclosure of the entire $500,000 mortgage, but regarded that as purely incidental. Certainly the latter figure represented the "sum or value of that which the defendant will lose if the complainant succeeds in his suit" (the exact language of the *Cowell* case) but that circumstance was clearly not regarded as important by the court.

Werner v. Murphy, 60 Fed. 769, decided by the Circuit Court of New Jersey, is another of the decisions relied upon in the *Cowell* case. There the plaintiff's claim amounted to $1489.33 and he sought to set aside fraudulent conveyances to property worth vastly in excess of the jurisdictional amount. Clearly the defendants who had received these conveyances stood to lose more than the jurisdictional amount, but the court held that jurisdiction was to be measured solely by plaintiff's claim and that being insufficient, jurisdiction was denied.

Without reviewing all of the cases cited in the *Cowell* case, we submit the foregoing to show how unwarranted was the quoted statement of the Circuit Court of Appeals in that decision.

As already indicated, the only decision cited in the *Cowell* case which in any way supports the portion we have quoted therefrom is *Smith v. Adams*, 130 U.S. 167, 9 Sup. Ct. 566, 32 L. ed. 895.

In that case there was again involved the question of the then jurisdictional amount of $5,000 for appeals to the Supreme Court. The controversy essentially was one between a taxpayer and a county over a change of location of the County seat. The county commissioners, trying to appeal from an adverse decision, contended that jurisdiction existed because the city in which the new county seat was to be located had given the county a tract of land, which the county might lose if the plaintiff succeeded in his challenge to the validity of the election changing the location of the county seat. The value of this property was said to be more than $5,000.

The actual decision of the court was based on the narrow point that the loss of this property was not the matter in dispute but merely a collateral incident thereto. The exact language of the court in reaching this conclusion is:

> "The acquisition or loss of the land in question is not a necessary consequence of the election for the county seat, such result not being created by law, but by a mere accident arising from a voluntary gift by Aberdeen, made contingent on the removal of the county seat to that place and its continuance there."

Thus the court held that since this factor was irrelevant to valuation of the matter in dispute, and there was nothing else to indicate the jurisdictional value, jurisdiction should be denied. In discussing the problem of jurisdiction, the court makes the following statements which possibly lean in the direction of a defendant viewpoint rule:

> "It is conceded that the pecuniary value of the matter in dispute may be determined, not only by the money judgment prayed where such is the case, but in some cases by the increased or diminished value of the property directly affected by the relief prayed, or by the pecuniary result to one of the parties immediately from the judgment."
>
> * * * * * * * *
>
> "Not doubting the correctness of the doctrine thus stated, we do not perceive how it can help the appellants. It is true they represent the county, but it is impossible to state any rule, by which the benefit the county may gain, or the damage it may suffer from the result of the election contested, can be estimated."

In the first of these statements the court mentions "pecuniary result to one of the parties" and in the second it mentions "gain" or "damage" to the county. It does not, however, appear that any question of the plaintiff viewpoint versus defendant viewpoint rule was argued to the court. The court said that the rules it announced were "conceded." What the court obviously had in mind was its ultimate holding of no jurisdiction, because the only matter sought to be valued was a collateral rather than a direct and immediate consequence of the litigation.

In view of its ultimate holding and informal approach, we do not believe *Smith v. Adams* was ever intended to be an outright adoption of the defendant viewpoint theory. Even if it were so intended, we are entirely confident that such is not the view of the modern Supreme Court cases upon which we rely and to which we shall in due course refer.

Reverting to the *Cowell* case, appellees concede that the language which we have quoted from that decision has been quoted in a considerable number of cases in the lower federal courts in the last forty years. It is a singular circumstance that the *Cowell* case has never been quoted or even cited by the Supreme Court of the United States. Neither has that court, since the decision in the *Cowell* case, used any language which would lend support to the theory that it recognized the defendant viewpoint rule. On the contrary, as we shall demonstrate at a slightly later point in this brief, the expressions of the Supreme Court of the United States all point to adherence to the plaintiff viewpoint rule exclusively.

It is equally singular that the lower federal courts have so frequently adopted the quotation in the *Cowell* case as the leading authority expressing the rules by which jurisdiction is tested, and have shown, in so doing a complete lack of interest in the expressions of the Supreme Court of the United States upon that subject.

So far as an extended investigation on our part has been able to develop, the repetition by the lower federal courts of the language of the *Cowell* case is, in all instances subsequent to the decision of that case

in 1903, nothing more than dictum except in two decisions. In all of the decisions except these two the amount which the plaintiff stood to gain or the defendant stood to lose was precisely the same, and consequently jurisdiction would or would not exist in those cases by applying the plaintiff viewpoint rule only.

The two instances in which the *Cowell* case has been relied upon to apply the defendant viewpoint rule, so as to sustain jurisdiction in circumstances where the value of plaintiff's right did not equal the jurisdictional amount, are *Ronzio v. Denver & Rio Grande R. R.*, 116 F.(2d) 605, a decision of the Circuit Court of Appeals for the Tenth Circuit, and *Armstrong v. Townsend*, 8 F. Supp. 953, a decision of the District Court of Indiana.

Neither of these decisions makes any critical analysis into the sources of the rule in the *Cowell* case. In both decisions it is simply assumed that jurisdiction can be tested in the alternative from the viewpoint of the plaintiff or of the defendant. This same lack of critical analysis is, it may be noted, common to all of the decisions resting on the language of the *Cowell* case.

There are occasional decisions to be found which invoke the decision of the Supreme Court of the United States in *Mississippi & Missouri R. R. Co. v. Ward*, 2 Black 772, as an authority for the defendant viewpoint rule. This case is an even frailer reed upon which to base the defendant viewpoint doctrine than is the *Cowell* case, but being a decision of the Supreme Court of the United States, merits attention in the

consideration of this problem. The *Ward* case was decided in 1862. It was an action brought by the part owner of three steamboats, seeking the abatement of a bridge across the Mississippi River, on the ground that it constituted a nuisance. It is highly questionable that jurisdictional amount was in dispute in this case. The court starts by saying. "It is insisted that Ward cannot sue alone and could only come before the court jointly with the other part owners of the vessels injured and delayed." The court then enters upon a paragraph of discussion entirely devoted to the right of Ward to maintain his suit for abatement of nuisance without joining the co-owners of the boats. However, in the last sentence, with no previous indication that the subject of jurisdictional amount is in question, the court says:

> "But the want of a sufficient amount of damage having been sustained to give the federal courts jurisdiction, will not defeat the remedy, as the removal of the obstruction is the matter of controversy, and the value of the object must govern."

This language has been quoted as being in some way indicative of support of the defendant viewpoint rule. We are confident that anyone who will read the *Ward* case, without preconceived notions on the subject, will come immediately to three conclusions. One is that it is doubtful if the court by this single sentence, included in a discussion of an entirely different problem, intended to lay down any hard and fast rule with respect to jurisdictional amount. Second, that if such was the intention, the problem was by no means care-

fully considered. Third, that the single sentence above quoted is highly ambiguous.

Just what did the court mean by the word "object" in the final clause of the sentence? The only way to render the statement in the *Ward* case intelligible is to interpolate into the quotation, after the word "object," the words "to be gained." This is precisely what was done by the Supreme Court of the United States in *Hunt v. New York Cotton Exchange*, 205 U.S. 322, 27 Sup. Ct. 529, 51 L. ed. 821, where, in speaking of the *Ward* case, the court said:

> "In *Mississippi & Missouri Railroad Company v. Ward*, 2 Black 485, it was decided that jurisdiction is to be tested by the value of the object to be gained by the bill."

Such an interpretation of the language of the *Ward* case, which is the only reasonable interpretation, constitutes clearly an adoption of the plaintiff viewpoint rule. Jurisdiction is to be measured by the value of the object *to be gained*, not by what anyone will lose. Naturally the person who is to gain something is the plaintiff, and it is from his viewpoint alone that the rule of the *Ward* case, so construed by the Supreme Court of the United States in the *Hunt* case, measures the jurisdictional amount. The same interpretation of the *Ward* case was made in *Packard v. Banton*, 264 U.S. 140, 44 Sup. Ct. 257, 68 L. ed. 596. Any effort to apply the *Ward* case as an authority for the defendant viewpoint rule is obviously unsound.

Thus far we have devoted ourselves to an exploration of the sources and authorities which are claimed by the appellant to support the defendant viewpoint rule. We have referred, on a number of occasions, to

our primary proposition that this rule is not recognized by the modern decisions of the Supreme Court of the United States.

It is high time to consider those cases in this brief. Equally the time has come for a clear cut adoption by the lower federal courts of the principles announced by the Supreme Court in those cases, so as to dispose of the erroneous defendant viewpoint rule once and for all.

This Court knows that the Supreme Court of the United States has very recently not only announced certain strict rules for testing the jurisdiction of the federal courts, but also has imposed upon the courts the duty of making an independent inquiry into the existence of jurisdiction even in those cases where the parties have not seen fit to raise the question themselves. It has unqualifiedly taken the position that the presence of the jurisdictional amount must clearly appear, and that the burden of showing that the jurisdictional amount is present is cast upon the plaintiff. These principles and others were most positively brought to the attention of the bench and bar in the cases of *McNutt v. General Motors Acceptance Corporation*, 298 U.S. 178, 56 Sup. Ct. 780, 80 L. ed. 1135, and *KVOS, Inc. v. Associated Press*, 299 U.S. 269, 57 Sup. Ct. 197, 81 L. ed. 183, both decided in 1936. As is demonstrated by the opinions in those cases, the principles there announced so emphatically were not new, but had adequate support in the earlier authorities; not only so but also the principles of the two cases cited have been reaffirmed in a number of subsequent cases.

The principles announced in the two cases cited, as well as in many preceding and following them, include the plaintiff viewpoint rule as the only rule from which the value of the matter in controversy can be tested.

Of the various decisions of the Supreme Court of the United States the one containing the clearest announcement of the plaintiff viewpoint rule is *Glenwood Light & Water Co. v. Mutual Light, Heat & Power Co.*, 239 U.S. 121, 36 Sup. Ct. 30, 60 L. ed. 174. In that case the plaintiff sought to compel the defendant to remove its poles and wires from the streets on the ground that they interfered with the equipment of the plaintiff. The trial court held that the jurisdictional amount was to be determined by taking the cost to defendant of removing its poles and wires. The Supreme Court held that it was erroneous to employ this defendant viewpoint test, and that the inquiry should have been limited to determining the value to the plaintiff of its right to maintain and operate its plant and conduct its business free from wrongful interference by the defendant. The exact language of the court on this subject is as follows:

> "We are unable to discern any sufficient ground for taking this case out of the rule applicable generally to suits for injunction to restrain a nuisance, a continuing trespass, or the like, *viz.*, that *the jurisdictional amount is to be tested by the value of the object to be gained by complainant.*" * * *
>
> "The district court erred in testing the jurisdiction by the amount that it would cost defendant to remove its poles and wires where they con-

> flict or interfere with those of complainant, and replacing them in such a position as to avoid the interference. Complainant sets up a right to maintain and operate its plant and conduct its business free from wrongful interference by defendant. This right is alleged to be of a value in excess of the jurisdictional amount, and at the hearing no question seems to have been made but that it has such value. *The relief sought is the protection of that right, now and in the future, and the value of that protection is determinative of the jurisdiction.*"

It should be observed that the court in the *Glenwood* case treated *Mississippi & Mo. R. Co. v. Ward*, 2 Black 485, *supra*, in the same manner as was done by *Hunt v. New York Cotton Exchange*, 205 U.S. 322, 27 Sup. Ct. 529, 51 L. ed. 821, where it was said that jurisdiction "is to be tested by the value of the object to be gained by the bill."

In the *Hunt* case the suit was one by the Cotton Exchange to enjoin the use of market quotations, issued by the Exchange, without first obtaining its consent. The court held that jurisdiction was to be tested by the value to the plaintiff Exchange of the right asserted by it. In so holding the court said:

> "The object of this suit is to protect this right. The right therefore is the matter in dispute and its value to the Exchange determines the jurisdiction * * *."

This test of the value of the right to the plaintiff, not of the possible financial loss to the defendant, runs through all of the modern decisions of the Supreme Court of the United States.

Thus, in *KVOS, Inc. v. Associated Press*, *supra*, the

court, in holding that existence of the necessary jurisdictional amount was not shown, said:

> "The bill seeks redress for damage to the respondent's business and for damage to the business of some or all of its members. The right for which the suit seeks protection is, therefore, the right to conduct those enterprises free of the alleged unlawful interference by the petitioner. No facts are pleaded which tend to show the value of that right."

Likewise, in *McNutt v. General Motors Acceptance Corporation, supra,* the court directed its entire inquiry to the value of the right asserted by the plaintiff. The court said:

> "Respondent invokes the principle that jurisdiction is to be tested by the value of the object or right to be protected against interference. *Hunt v. New York Cotton Exchange,* 205 U.S. 322; *Bitterman v. Louisville & Nashville R. Co.,* 207 U.S. 205; *Berryman v. Whitman College,* 222 U.S. 334; *Glenwood Light Co. v. Mutual Light Co.,* 239 U.S. 121; *Healy v. Ratta,* 292 U.S. 263. * * * The object or right to be protected against unconstitutional interference is the right to be free of that regulation. The value of that right may be measured by the loss, if any, which would follow the enforcement of the rules prescribed."

In the later decision of *Gibbs v. Buck,* 307 U.S. 66, decided in 1938, the plaintiff sought to enjoin enforcement of a statute prohibiting plaintiff from carrying on its business in the manner which it had formerly done. In considering the problem of jurisdictional amount the court said:

> "Under such circumstances, the issue on juris-

> diction is the value of this right to conduct the business free of the prohibition of the statute."

In further discussion of the problem, the court in *Gibbs v. Buck, supra,* reviewed the *McNutt* and *KVOS* cases, and in so doing recognized that the sole inquiry into jurisdictional amount concerned value of the right asserted by the plaintiff.

Buck v. Gallagher, 307 U.S. 95, decided in 1939, was similar on its facts to *Gibbs v. Buck, supra.* In *Buck v. Gallagher* the plaintiff sought to enjoin a Washington statute prohibiting the conduct of plaintiff's business, upon the ground that the statute was unconstitutional. In discussing the question of jurisdictional amount, the court said:

> "Whether a state statute is regulatory or prohibitory, when a bill is filed against its enforcement under §266 of the Judicial Code, the matter in controversy is the right to carry on business free of the regulation or prohibition of the statute."

See also *Lion Bonding Company v. Karatz,* 262 U.S. 77, 43 Sup. Ct. 480, 67 L. ed. 871.

In all of the foregoing cases the principle is clearly established that the right asserted by the plaintiff is the "matter in controversy," which the statute says must have the necessary jurisdictional value of $3,000. The opinions speak only of the value of the right or the value of the object to be gained, both of which phrases are consistent only with the plaintiff viewpoint rule. There is not a syllable in these decisions recognizing the alternative standard mentioned by the *Cowell* case. If this alternative rule of the *Cowell* case were the proper one, the Supreme Court, in all of the

cases cited where jurisdiction was denied, would be in the position of having considered only one-half of the problem before it. Having found, in such cases, that jurisdiction did not exist from the plaintiff's standpoint, it would of necessity in each case have to then view and dispose of the case from the defendant's standpoint. That it has never seen fit to do so, and has in the most positive language confined itself to a discussion of the value of the right to the plaintiff, is the clearest evidence that the court is committed to the plaintiff viewpoint rule as the sole test of jurisdiction.

If there could be any doubt left on this subject, it would be disposed of by that line of cases of which *Thompson v. Gaskill*, 315 U.S. 442, 62 Sup. Ct. 673, 86 L. ed. 611, is the most recent example. In that case, as in many others preceding it, the action was brought by a number of plaintiffs whose claims individually were less than the jurisdictional amount, but in the aggregate exceeded that amount. The rule announced in *Thompson v. Gaskill*, and in a long line of cases preceding it, and involving the same problem, is that the claims of the plaintiffs cannot be aggregated to meet the requirements of jurisdictional amount unless the claimants have an undivided interest in a common fund. In other words, where their interests are several, aggregation cannot be made to give the court jurisdiction. It is perfectly obvious that an application of the defendant viewpoint rule in these cases would sustain jurisdiction. To revert to the exact language of the *Cowell* case, "the sum or value of that which the defendant will lose if the complainant suc-

ceeds in his suit," would certainly be in excess of $3,000 in all of these cases. Despite this fact, the Supreme Court of the United States has never even suggested that jurisdiction could be sustained in this class of cases upon the basis of the defendant viewpoint rule.

Clay v. Field, 138 U.S. 464, 11 Sup. Ct. 419, 34 L. ed. 1044;

Wheless v. St. Louis, 180 U.S. 379, 21 Sup. Ct. 402, 45 L. ed. 583;

Rogers v. Hennepin County, 240 U.S. 136, 36 Sup. Ct. 345, 60 L. ed. 566;

Scott v. Frazier, 253 U.S. 243, 40 Sup. Ct. 503, 64 L. ed. 883;

Clark v. Paul Gray, Inc., 306 U.S. 583, 59 Sup. Ct. 744, 83 L. ed. 1001.

We have observed on several occasions that the lower federal courts have been prone to quote the language of the *Cowell* case in defining the test of jurisdiction. It must not be understood, however, that all of the lower federal courts have adopted this language and disregarded that of the Supreme Court. For example, this court itself in *Electro-Therapy Products v. Strong*, 84 F.(2d) 766, said:

> "The matter in controversy is the right which appellant asserts and seeks to have protected and enforced, namely, the right to have the inventions above referred to assigned to appellant, and to no one else. *The District Court's jurisdiction is to be tested by the value of that right. McNutt v. General Motors Acceptance Corp.*, 298 U.S. ....., 56 S. Ct. 780, 80 L. ed. ....., decided May 18, 1936."

And the Circuit Court of Appeals for the Second

Circuit, in *Central Mexico Light & Power Co. v. Munch*, 116 F.(2d) 85, specifically recognized the correctness of the plaintiff viewpoint rule, saying:

> "* * * Plaintiffs assert, however, that in a claim for injunction against these defendants their separate ownerships are not controlling, and that the value of the interest to plaintiffs is the test. This, the so-called plaintiff's viewpoint test—disclosed by Judge Dobie in 38 Harv. L. Rev. 733, and in 1 Moore's Federal Practice 511, 512 and 49 Yale L. J. 274—seems now well settled; but the cases require of the plaintiffs precision in showing exactly what interest the injunction is to protect and that its value exceeds $3,000. *McNutt v. General Motors Acceptance Corp.*, 298 U.S. 178, 56 S. Ct. 780, 80 L. ed. 1135; *Kroger Grocery & Baking Co. v. Lutz*, 299 U.S. 300, 57 S. Ct. 215, 81 L. ed. 251; 49 Yale L. J. 274. As is pointed out in *Healy v. Ratta*, 292 U. S. 263, at 270, 54 S. Ct. 700, 703, 78 L. ed. 1248, the 'policy of the statute' defining federal jurisdiction, 28 U.S.C.A. §41 (1), and 'due regard for the rightful independence of state governments' both call for a strict construction of jurisdictional requirements."

Likewise, the Circuit Court of Appeals for the Fourth Circuit, in *Purcell v. Summers*, 126 F.(2d) 390, uses the following language:

> "It is well settled that the measure of jurisdiction in a suit for injunction is the value to plaintiff of the right which he seeks to protect."

Although the Circuit Court in the latter decision reversed the decision of the District Court for the Eastern District of South Carolina upon the ultimate point there involved, it did affirm the decision of the

lower court upon the question of jurisdiction. In the District Court decision in *Purcell v. Summers*, 34 F. Supp. 421, the District Court in passing upon the question of jurisdiction discussed the plaintiff viewpoint rule in some detail and came to the conclusion that this was the only correct rule, stating:

> "It is believed that subsequent and more recent decisions have, however, established the principle that the matter in dispute is the right the plaintiff seeks to protect."

By way of re-emphasis, the Circuit Court for the Ninth Circuit has in effect followed the rule announced by it in *Electro-Therapy Products v. Strong*, *supra*, in the decision of *Gavica v. Donaugh*, 93 F. (2d) 173. In that case the court, in discussing jurisdiction, speaks constantly of the rights of the plaintiff and finds that those rights do not have the necessary jurisdictional value.

Other decisions of the lower federal courts likewise recognize this principle, but the foregoing sufficiently illustrate the point under discussion.

The appellant in its brief has referred to certain statements of the text writers announcing the existence of the defendant viewpoint rule. An examination of the texts quoted will reveal that the statements do not represent any independent judgment upon the part of the text writers but are simply made on the authority of the *Cowell* case and similar decisions, and thus rise no higher than the equivalent statements of appellant's counsel in appellant's brief, which are based upon the same authorities. Appellant does not refer to the one really excellent, scholarly and

critical discussion of the plaintiff viewpoint-defendant viewpoint controversy, which is an article by Armistead M. Dobie, author of Dobie on Federal Procedure, appearing in 38 Harvard Law Review 733. We shall not attempt to review Judge Dobie's excellent commentary other than to state that it utterly disposes of the defendant viewpoint rule as a valid theory. The author cites and discusses all of the pertinent authorities. We join with Judge Dobie in the view that *Glenwood Light & Water Co. v. Mutual Light, Heat & Power Co.*, *supra*, 239 U.S. 121, 36 Sup. Ct. 30, 60 L. ed. 174, should have settled this controversy once and for all and that the myriad of conflicting decisions in the lesser federal courts should thereafter have ceased to afford a ground for controversy. We have no doubt that the *Glenwood* case did settle the matter for the Supreme Court of the United States, and that the principles so frequently announced by that court, and recognized by the court before which this appeal is to be heard, should be applied here to deny jurisdiction of the federal courts in this case.

JURISDICTIONAL AMOUNT DOES NOT EXIST AS TO THE FIRST MATTER IN CONTROVERSY.

As already noted, the parties have employed the designation "first matter in controversy" with respect to the question of whether the executors of Blethen, Sr. or the trustees named in the contract of December 30, 1929, should vote Blethen, Sr.'s Class B stock of the Seattle Times Company and his stock in The Blethen Corporation during the period of probate. The appellant has relegated this matter in controversy to

a secondary position in its brief as a basis for supporting the jurisdictional amount. The argument that jurisdictional amount can be based upon this first matter in controversy is so obviously untenable that we do not wonder that this point has been subordinated in appellant's brief. We are only surprised that it is seriously advanced at all as a basis for sustaining jurisdiction. That it cannot involve the jurisdictional amount is established beyond all peradventure of doubt by the following propositions:

First. That no cause of action is stated with respect to this matter of controversy because under the law of the State of Washington the executors of one dying testate have, as a matter of law, the title, management and control of the personal property of the decedent. Consequently, any agreement to create a trust by will contemplates only that the trust shall commence upon the expiration of the probate proceeding.

Second. That even if it were legally possible for the trustees to assume title, possession or control of the corporate stock during probate, the matter in controversy, concerning as it does solely the voting power on such stock, would not, under the facts of this case, be susceptible of valuation in terms of money. In the same connection it may be further observed that the appellant, as plaintiff in the court below, did not meet the burden of proof to show that the value of the trust was $3,000, or any other sum.

NO CAUSE OF ACTION IS STATED ON THE FIRST MATTER IN CONTROVERSY BECAUSE UNDER THE LAWS OF THE STATE OF WASHINGTON THE EXECUTORS OF A DECEDENT HAVE THE TITLE, MANAGEMENT AND CONTROL OF HIS PERSONAL PROPERTY DURING PROBATE TO THE EXCLUSION OF THE TRUSTEES NAMED IN HIS WILL.

It must be kept in mind that the will of Blethen, Sr. is silent as to the vesting of the voting power on the stock during probate. This contract and the others simultaneously executed were obviously prepared with care, and it naturally must be assumed that this omission was deliberate. Even if such were not the case, however, any contractual provision which would deprive the executors of the ownership, management or control during the period of probate would be, and is, unenforcible under the law of the State of Washington.

It is a fundamental principle of law of the State of Washington that title to the personal property of a decedent vests in his personal representatives immediately upon his death, and that no interest can be acquired by any other person therein until such property has been distributed in the probate proceeding. As a matter of fact, the rule of this State goes even further and gives to the executors complete possession and control of real estate, even though the technical title to such property, in contrast to that of personal property, vests in the heirs immediately upon death.

The Washington rule is stated in Remington's Revised Statutes, Section 1464, in the following language:

"Every executor or administrator shall, after

having qualified, by giving bond as hereinbefore provided, have a right to the immediate possession of all the real as well as personal estate of the deceased, and may receive the rents and profits of the real estate until the estate shall be settled or delivered over, by order of the court, to the heirs or devisees, and shall keep in tenantable repair all houses, buildings and fixtures thereon, which are under his control."

And more specifically, in the case of non-intervention executors, Remington's Revised Statutes, Section 1463 provides:

"Executors acting under wills such as are mentioned in the last preceding section shall have power, after the filing of an inventory of the estate, if the said estate has been adjudged solvent, to mortgage, lease, sell and convey the real and personal property of the testator without an order of the court for that purpose and without notice, approval or confirmation, and in all other respects administer and settle the estate without the intervention of the court."

The Supreme Court of the State of Washington has, on numerous occasions, recognized the exclusive rights of the executor as to the possession and management of both real and personal property during probate and as to the title of the executor in the personal property during the same period. Thus, in *Bishop v. Locke*, 92 Wash. 90, 158 Pac. 997, the devisee of an undivided one-half interest in certain real estate sought partition during the period of probate. In denying relief the court said:

"* * * It is the settled law of this state that executors and administrators are entitled to the

possession and *control* of the property, both real and *personal*, of estates while being administered by them, as against heirs and devisees, as well *as all other persons.* Rem. & Bal. Code, §§1366, 1449, 1534; *Gibson v. Slater*, 42 Wash. 347, 84 Pac. 648; *Griffith v. James*, 91 Wash. 607, 158 Pac. 251."

And in the very recent decision of *In re Peterson's Estate*, 12 Wn. (2d) 686, 123 P. (2d) 733, at page 734 in the Washington Reports, the court said:

"We do not deny that, upon the death of Lars Peterson, the *title* to the real property comprising the bulk of his estate vested in his son, L. A. Peterson. But until he should complete the administration of the estate, his only right to possession of the real property and to the rents and profits therefrom derived from his appointment as administrator. Rem. Rev. Stat., §1464 (P.C. §9969); *Gibson v. Slater*, 42 Wash. 347, 84 Pac. 648; *Bishop v. Locke*, 92 Wash. 90, 158 Pac. 997; *Wendler v. Woodard*, 93 Wash. 684, 161 Pac. 1043. Only after an estate has been closed can the heirs, by acquiring these additional rights in the property, become entitled to treat it as their own."

Again, in *Collins v. Northwest Casualty Co.*, 180 Wash. 347, 39 P.(2d) 986, the court said:

"As to the right of Wallace, the specific bequest of the car would not be effective to confer upon him any control pending probate of the will. After probate, title vested in the executor, subject to the *claims of creditors* of the deceased. Title to the car could come to Wallace only through the executor at the close of administration.

" 'The personalty of the deceased goes prim-

> arily to the executor or administrator as assets and not to the heir, and this has been held to be true even though there are no debts, and one claiming the personalty is the sole distributee. The title of an executor or administrator with the will annexed to particular personal property is not affected by the fact that it was specifically bequeathed or has been set aside for the payment of a particular legacy.' 23 C. J. 1127."

The court then continued to quote the same language which we have already quoted above from *Bishop v. Locke, supra.*

To the same effect see:

Gibson v. Slater, 42 Wash. 347, 84 Pac. 648;

Jones v. Peabody, 182 Wash. 148, 45 P. (2d) 915.

None of the foregoing Washington cases deals with the bequest or devise to a trustee, but the same principle is, beyond doubt, equally applicable in such a case.

The trustee named in the will is simply a legatee or devisee as is any other person, the only difference being that he takes his legacy or devise for the benefit of some other person rather than for himself. The fact that such a trustee acquires no rights whatsoever in the property until distribution has been made to him by the personal representatives of the decedent, is announced in the most emphatic terms by a large number of decisions from other jurisdictions.

In *In re Roach's Estate*, 50 Ore. 179, 92 Pac. 118, the court announced this rule as follows:

> "* * * In the case supposed, a moment's re-

flection would seem to induce the conclusion that, when an executor lawfully secures possession of the property of a decedent's estate, any intermeddling therewith by a testamentary trustee, until the executor has been discharged, would be regarded by the probate court as the usurpation of its authority, for, as the testator's debts, funeral expenses, etc., must be paid before any trust can attach to the property, under a devise or bequest thereof, the jurisdiction of such court necessarily precedes that of an equity tribunal, and is therefore exclusive. When the *same* person has been appointed by a will to perform such dual duty, in respect to the property of an estate, no service is demanded of him as testamentary trustee until he has fully performed his executorial obligation and secured an order of the probate court discharging him and liberating his bondsmen. Thus in *Prindle v. Holcomb*, 45 Conn. 111, it was held that the probate records should show that an executor's account had been settled, before a testamentary trustee was entitled to take and hold the property of the estate for the purpose of the trust."

This rule was affirmed by the Oregon Court in *In Re McDermid's Estate*, 109 Ore. 633, 222 Pac. 295, where the court not only quoted from and relied upon *In Re Roach's Estate*, *supra*, but, in addition, said:

"The difficulty in this case is solved by mentally segregating the dual relation of Bourhill as executor from his relation to the estate as trustee under the will. The two offices are practically distinct; as much so as though Bourhill had been appointed executor of the will and some other person as trustee. His executorial

duties must first be performed before he can exercise his duties as a trustee."

The Supreme Court of Idaho, in *Jones v. Broadbent*, 21 Ida. 555, 123 Pac. 476, announces the same rule in the following categorical language:

"Before distribution, they held possession of all property of said estate as executors, not as trustees, and they, as trustees, would have no authority to meddle or interfere with the due administration of said estate until such administration had been completed, and until they had been discharged as executors, or until a partial distribution has been made.

"When the same person has been appointed by will to perform some dual duty, such as executor and trustee, in respect to the property of the estate, no service is demanded of him, as trustee, until he has performed his executorial obligations, and distribution is made. *In re Roach's Estate, supra.*

"In *Prindle v. Holcomb*, 45 Conn. 111, it was held that the probate records should show that an executor's account had been settled, before a testamentary trustee was entitled to take and hold the property of the estate for the purpose of the trust."

In addition, the Idaho court quotes further, in support of its opinion, from *Goad v. Montgomery*, 119 Cal. 552, 51 Pac. 681, 63 Am. St. Rep. 145, and also cites *In re Higgins Estate*, 15 Mont. 474, 39 Pac. 506, 28 L. R. A. 116.

An even clearer and more positive statement appears in the case of *Newcomb v. Williams*, 50 Mass. 525, which is quoted at length in *In re Higgins*

Estate, 15 Mont. 474, 39 Pac. 506. In the *Newcomb* case, as here, it was urged that it was intended that the trustee should assume his functions immediately upon the death of the testator, in disregard of any rights of the executor. The court held that such a thing was legally impossible. In so doing it discussed the pertinent rules at length, reaching the following conclusion:

> "* * * *If a testator were to appoint no executor, or direct that the estate should go immediately into the hands of legatees, or of one or more trustees, for particular purposes, such direction would be nugatory and void; and, it being a will in which no executor is appointed, it would be the duty of the judge of probate to appoint an administrator with the will annexed, who would have all the powers of an executor, and in whom all the personal property would vest.*"

To the same effect see *In re Kachelmacher's Estate*, 40 Ohio App. 282, 178 N.E. 314; *Bellinger v. Thompson*, 26 Ore. 320, 37 Pac. 714.

The rules of the foregoing decisions are so well established that further citation of authorities would be tedious.

The appellant in its brief, although fully aware of the existence of this question, has devoted no discussion to it. Appellant would completely overlook the familiar rule, that before anyone, legatee, devisee, trustee, or otherwise, can acquire control of a decedent's property, that property must first go through the orderly course of probate, where it is at all times under the control of the personal representatives, who

themselves function under the jurisdiction of the probate court in the interest not only of the ultimate beneficiaries of the estate, but also of its creditors.

Appellant's position would strip the executors of the control of property which they must hold for the payment of any inheritance taxes to the State and Federal governments, for the satisfaction of the claims of creditors, for the expenses of administration, and for final distribution under an appropriate decree of the probate court.

And in asserting these propositions in its complaint, appellant states no cause of action because there is no provision in the contract entitling the trustees to vote the stock during probate, and if there were, it would be illegal and void.

EVEN IF THE COMPLAINT DID STATE A CAUSE OF ACTION AS TO THE FIRST MATTER IN CONTROVERSY, THE JURISDICTIONAL AMOUNT OF $3,000 WOULD NOT BE PRESENT WITH RESPECT TO SAID MATTER BECAUSE THIS MATTER OF CONTROVERSY IS NOT SUSCEPTIBLE OF VALUATION IN TERMS OF MONEY.

The first matter in controversy concerns one thing only, that is, whether the voting of the stock during the period of probate should be controlled by the executors under the will or by the trustees, subject to arbitration as provided by paragraph Eight of the contract of December 30, 1929. Regardless of what form of words may be used to describe the situation, there is no escape from the fact, in the last analysis, that the question simply comes down to one of voting control. The appellant, in an effort to escape this ultimate fact, describes the right asserted as follows:

> "It is the right to be put in position to protect an investment of approximately $1,500,000."

If this were an accurate statement, we would still maintain that it is impossible to place a monetary valuation upon such a right, but, in truth, such a definition of the right asserted is entirely inaccurate.

To state the matter involved in a most detailed manner, the appellant asserts that it is entitled to have this Court enter a decree under which three trustees, one of whom is a stockholder of the appellant corporation, shall have the right during probate to vote the stock, provided that any trustee who is in disagreement with the others shall have the further right to invoke arbitration by the then general man-

ager of the Associated Press, whose decision upon such question shall be final.

It would be difficult to conceive a right which would more effectively defy valuation in terms of money. Even if we were confronted here with the simple and fundamental question as to whether A or B, two individual persons, should vote a particular block of stock, it would be impossible to say what the right of either simply to vote the stock would be worth. It might be agreed that such a right in a particular case would be an important and a valuable one, but it would be impossible to give it a monetary valuation. In the present case, however, such impossibility of monetary valuation is far more apparent. Here the appellant asserts that the stock should be voted by three trustees. The decision of such a group, or a majority thereof, involves more elements of speculation perhaps than if the stock were to be voted by a particular person. However, the matter does not end even here, because, in the event of any division of opinion between the three trustees, any one of them would have the right to call upon the arbitrator for an ultimate decision. That arbitrator might decide for either of the factions as he saw fit under the circumstances. Consequently, in the final analysis, any valuation of the right to vote the stock in this case rests ultimately upon the value of an arbitration. This certainly is something that cannot be valued in terms of money.

We have repeatedly emphasized the necessity that the matter in controversy be susceptible of valuation in terms of money. That is exactly the position that

the courts have repeatedly taken. For better or worse, the Act of Congress conferring jurisdiction in cases based on diversity of citizenship, has fixed a value in money as an essential element for the exercise of jurisdiction. In this condition of affairs, the federal courts have long recognized that there are many rights undoubtedly of great value and priceless to the persons involved, but which are not capable of valuation in terms of money. In such circumstances the courts have consistently held that federal jurisdiction could not be exercised.

Thus in *Elgin v. Marshall*, 106 U.S. 578, 1 Sup. Ct. 484, 27 L. ed. 249, the court said:

> "*The rule, it is true, is an arbitrary one, as it is based upon a fixed amount, representing pecuniary value, and, for that reason, excludes the jurisdiction of this court, in cases which involve rights that, because they are priceless, have no measure in money. Lee v. Lee*, 8 Pet. 44; *Barry v. Mercein*, 5 How. 103; *Pratt v. Fitzhugh*, 1 Black 271; *Sparrow v. Strong*, 3 Wall. 97. But, as it draws the boundary line of jurisdiction, it is to be construed with strictness and rigor. As jurisdiction cannot be conferred by consent of parties, but must be given by the law, so it ought not to be extended by doubtful constructions."

In *Kurtz v. Moffitt*, 115 U.S. 487, 65 Sup. Ct. 148, 29 L. ed. 458, the problem of rights not capable of valuation in money is extensively considered. That was an action in which it was sought to remove a *habeas corpus* proceeding from the state to the federal court. The Supreme Court reviews a large num-

ber of the earlier decisions involving the same question, and concludes with this very apt summary:

> "*From this review of the statutes and decisions, the conclusion is inevitable that a jurisdiction, conferred by Congress upon any court of the United States, of suits at law or in equity in which the matter in dispute exceeds the sum or value of a certain number of dollars, includes no case in which the right of neither party is capable of being valued in money;* and therefore that writs of habeas corpus are not removable from a State court into a Circuit Court of the United States under the act of March 3, 1875, ch. 137, §2, and this case was rightly remanded to the State court."

The case of *In re Red Cross Line*, 277 Fed. 853, is of special significance in the case at bar, because there the plaintiff sought specific performance of an agreement to arbitrate. As we have pointed out, arbitration is precisely what is ultimately involved in the first matter in controversy presented by the appellant in this case. In holding that the jurisdictional amount was not involved in an action to enforce an arbitration, the Court in the *Red Cross Line* case said:

> "But, whichever ground of jurisdiction be relied on, there is not the jurisdictional amount involved. *The value of an arbitration is one of convenience. No pecuniary value can be given to it, and a breach can only result in nominal damages. Street v. Rigby*, 6 Vesey 815. Such a cause of action cannot be removed. *Kurtz v. Moffit*, 115 U. S. 487, 6 Sup. Ct. 148, 29 L. ed. 458; *Youngstown v. Hughes*, 106 U. S. 523, 1

Sup. Ct. 489, 27 L. ed. 268; *DeKrafft v. Barney*, 2 Black 704, 17 L. ed. 350; *Whitney v. American Shipbuilding Co.* (D.C.) 197 Fed. 777.

> "The overpaid charter hire is not here the matter in dispute, but solely the right of specific performance of the agreement to arbitrate. If the arbitration is ordered, the function of the court, so far as the proceeding instituted goes, ceases."

In *Whitney v. American Shipbuilding Co.*, 197 Fed. 777, there was involved the right of the plaintiff, as a stockholder of a corporation, to examine books, papers, documents and records of the Company. As everyone knows, this right on the part of the stockholder may be one of very great value to him, but, like the right to vote his stock, it is not a valuation capable of determination in money. The court in this case, after reviewing the authorities, stated:

> "I am unable to say that the right involved in this controversy has a value which can be calculated and ascertained in money, and for that reason the plea will be sustained and the cause remanded. * * *"

Earlier in the opinion the court had stated:

> "The matter in dispute must be money or some right, the value of which in money can be calculated and ascertained."

In *Youngstown Bank v. Hughes*, 106 U. S. 523, 1 Sup. Ct. 489, 27 L. ed. 268, the bank filed a bill in equity seeking to enjoin the county auditor from compelling the bank to respond to a subpoena and make available to the auditor its records pertaining to the accounts of its depositors, so that the auditor might pro-

cure information as to the accuracy of statements made by the depositors as to the taxable value of their property. Denying to the bank the relief sought, the court said:

> "The present suit is not for money, nor for anything the value of which can be measured by money. The bank has no interest in the taxes to be placed on the tax duplicate. There is no property in dispute between the auditor and the bank. If the cashier is compelled to testify and to produce the books to be used in evidence for the purposes required, the damages, if any, resulting to the bank, would be, in the highest degree, remote and speculative. Certainly no suit for even nominal damages could be sustained against the auditor on account of what he had done."

These authorities conclusively demonstrate that the first matter in controversy cannot be valued in terms of money and therefore cannot support jurisdiction.

IN ANY EVENT, AND ASSUMING UNDER SOME THEORY THAT THE FIRST MATTER IN CONTROVERSY WERE SUSCEPTIBLE OF VALUATION IN TERMS OF MONEY, APPELLANT HAS NOT SUSTAINED THE BURDEN OF PROOF TO SHOW HOW THIS IS SO.

The case of *McNutt v. General Motors Acceptance Corporation, supra,* 298 U. S. 178, 56 S. Ct. 780, 80 L. ed. 1135, laid down, among others, two rules in most emphatic terms. One is that the plaintiff at all times has the burden of proof on the issue of existence of the jurisdictional amount. The other is that this proof must show the actual value of the precise matter in controversy, and that the plaintiff does not satisfy this burden simply by showing that it has large financial interests forming the background of the litigation. On this second point the General Motors Acceptance Corporation set forth in its complaint numerous allegations as to the magnitude of its financial transactions and holdings in the State of Indiana. The figures representing these items were far in excess of the jurisdictional amount. The issue, however, was whether the State of Indiana had the power to regulate the business activities of the corporation, and the latter did not show hom such regulation would affect it in the sum of $3,000. Accordingly jurisdiction was denied.

The appellant here seeks to do precisely the same thing as the General Motors Acceptance Corporation did in the case cited. It alleges and emphasizes the magnitude of its financial holdings in the Seattle Times Company. It does not, however, allege or prove,

with respect to the first matter in controversy, one single thing which would indicate that it would be one dollar better or worse off if the stock is voted by the executors during probate rather than by the trustees. It has thus utterly failed to meet the requirements of burden of proof, and by reason thereof jurisdiction must be denied.

CONCLUSION

The dismissal of a cause by a federal court for want of jurisdictional amount does not involve a denial of justice to a litigant who has a meritorious cause. It directs him simply to proceed in the proper forum. Obviously, in the instant case, the state court is open to the appellant if it has any cause of action. The jurisdiction of the federal court is strictly prescribed by the statute, and in diversity cases one of the requisites is that the matter in controversy have a value in excess of $3,000. The appellant has suggested that the purpose of this provision is to confine the activities of the federal courts to matters of large import. The statute and the decisions applying it say no such thing. Rather they require that a plaintiff who seeks to bring his cause to the federal court show that the value to him of the right asserted by him exceeds, in terms of money, the sum of $3,000. Failing to do so, his case falls within the doctrine of strict construction repeatedly announced by the Supreme Court of the United States, and most excellently stated in *Healy*

v. Ratta, supra, 292 U.S. 263, 54 Sup. Ct. 700, 78 L. ed. 1248, in

> "* * * the power reserved to the *states*, under the Constitution, to provide for the determination of controversies in *their* courts may be restricted only by the action of Congress in conformality to the judiciary sections of the Constitution. See *Kline v. Burke Construction Co.*, 260 U. S. 226, 233-234. Due regard for the rightful independence of *state* governments, which should actuate federal courts, requires that they scrupulously confine their own jurisdiction to the precise limits which the statute has defined. See *Matthews v. Rodgers, supra,* at 525; compare *Elgin v. Marshall,* 106 U. S. 578."

The appellant, having failed to make the necessary showing of jurisdiction here, the decision of the District Court dismissing its action for want of jurisdiction should be affirmed and appellant left, if it sees fit, to initiate its suit in the proper forum.

Respectfully submitted,

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